

DAVIES INSIGHTS

WOMEN ON BOARDS

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Women on Boards

2014



Davies Ward Phillips & Vineberg LLP is an integrated firm of approximately 240 lawyers with offices in Toronto, Montréal and New York. The firm is focused on business law and is consistently at the heart of the largest and most complex commercial and financial matters on behalf of its clients, regardless of borders.

Introduction

Canadian corporate governance leaders are facing increased pressure by regulators, investors, governance watchdogs and other market participants to enhance gender diversity among corporate Canada, resulting in some progress, albeit slow, in the representation of women among the leadership of Canadian public companies. Gender diversity received particularly heightened attention in 2013 and 2014 due to several developments, including continued calls from the federal government to improve the representation of women among Canada's corporate leadership, the appointment of Kathleen Taylor as the first female board leader of a major Canadian bank, and the release by the Ontario Securities Commission (the "OSC") and certain participating regulators of the Canadian Securities Administrators (the "CSA") of enhanced disclosure rules for Canadian public companies designed to promote gender diversity. This report summarizes the latest issues and developments in gender diversity, including practical insight into how public companies can enhance diversity and corporate decision-making, and ready themselves for compliance with the anticipated rule changes.

Canadian Regulators' Proposed "Comply or Explain" Model

On January 16, 2014, the OSC published for comment proposed amendments to Form 58-101F1 *Corporate Governance Disclosure* (the "OSC Amendments") under National Instrument 58-101 *Disclosure of Corporate Governance Practices* ("NI 58-101"). Subsequently, on July 3, 2014, several other participating securities regulatory authorities of the CSA followed suit and published for comment similar amendments to Form 58-101F1 of NI 58-101 (the "CSA Amendments" and, together with the OSC Amendments, the "Proposed Amendments").

The Proposed Amendments provide for an amended "comply or explain" disclosure rule that would require issuers listed on the Toronto Stock Exchange (the "TSX") and other non-venture issuers to annually disclose any director term limits and the representation of women on boards and in executive officer positions, including the number and proportion of women in those roles. The OSC has indicated that it intends to publish the final version of the amendments to Form 58-101F1 in the fall, with an anticipated implementation date of December 31, 2014. It is expected that the other participating regulators in the CSA Amendments will follow suit.

Women on Boards

➔ Recent Trends and Calls to Increase Gender Diversity

The lack of board diversity in Canada has been an increasingly pressing issue over the past few years and received heightened attention in 2013 and into 2014 from a variety of constituents and interest groups, including Canada's federal government, securities regulators, investors and other stakeholders. The Proposed Amendments came in response to several Canadian federal government and OSC studies, reports, public consultations, surveys and roundtables held over the past couple of years soliciting feedback on the most effective policies and disclosure practices for increasing the number of women on boards and in executive positions. They also came in response to a wealth of independent research in Canada and abroad showing that, relative to their proportion of the population, women remain significantly under-represented among company leadership, and that there may be real and tangible benefits to having greater diversity among corporate boards and senior management.

% Percentage of Board Positions Held by Women in 2014

12%

S&P/TSX Composite Index and S&P/TSX SmallCap Index

20%

S&P/TSX 60 Index

Over 50 comment letters were received in response to the OSC Amendments and comments to the CSA Amendments were due on September 2, 2014. Overall, the commentators strongly support the initiative to increase board diversity, in particular, the representation of women on boards and in senior management. Other developments in the area of gender diversity suggest that there may already be a growing momentum towards targets being promoted in the coming years, particularly if the Proposed Amendments do not produce meaningful progress in the representation of women on boards in Canada. For example, in mid-2014, the Federal Status of Women Minister Kellie Leitch announced that she plans to push corporate Canada to boost the number of women on their boards to 30% – nearly double the current level – within five years. While the proposed target would be voluntary, Minister Leitch has indicated that she intends to back up the proposal with monitoring, moral suasion and political pressure.

Although the level of female representation on boards and in board leadership positions has shown positive progress over the past several years, and despite continuing pressure from the government, regulators and other market participants, the rate of increase continues to be relatively slow, and significant gender disparity persists. For example, out of the total 3,253 board seats of issuers on the S&P/TSX Composite Index and the S&P/TSX SmallCap Index, only 401 (or 12.3%) were held by women in 2014, an increase over 10.5% in 2013. The percentage of board positions held by women for issuers on the S&P/TSX 60

Index was approximately 20.1% in 2014, up from 18.4% in 2013. At the same time, the percentage of women holding leadership positions on boards and board committees remains relatively low, with there being only two female board chairs of issuers on the S&P/TSX 60 Index and only 3.5% of women chairing boards of S&P/TSX Composite Index and S&P/TSX SmallCap Index issuers.

Similarly, the OSC noted that based on 448 responses to its November 2013 survey of about 1,000 TSX-listed issuers regarding gender diversity, 57% of respondents indicated they had no female directors, only 3% had a female chair of the board or female lead director and 53% indicated that women held less than 10% of executive positions. Recent data from the advocacy group Catalyst indicates there may have been some modest but promising improvements made in 2013. For example, women held 15.9% of board seats of Financial Post 500 companies in 2013, an increase of almost one-and-a-half percentage points since 2011. Catalyst also reported that women's representation at 266 public companies surveyed increased nearly two percentage points from 2011 to 2013, although Catalyst notes that public companies continue to have the lowest representation of women on boards as compared to private, Crown and cooperative companies.

**% OSC November
2013 Survey
Results**



➔ What Boards will Need to Disclose under the Proposed Amendments

The Proposed Amendments are intended to encourage more effective boards and better corporate decision-making by requiring greater transparency for investors and other stakeholders regarding the representation of women on boards and in senior management. The transparency is in turn intended to assist investors when making investment and voting decisions.

The Proposed Amendments will require TSX-listed and other non-venture issuers reporting in the participating jurisdictions to include the following disclosure annually in their proxy circulars:

- 01** **TERM LIMITS** - Disclosure of director term limits or an explanation for their absence (mandatory term limits are not proposed).
- 02** **METRICS** - Disclosure of the number and proportion of women on the board and in executive positions.
- 03** **POLICIES** - Disclosure of an issuer's "policies" on the representation of women on the board (including for identifying and nominating female directors), or an explanation for their absence.
- 04** **OBJECTIVES & PROVISIONS** - If such a policy has been adopted, disclosure of its objectives and key provisions, the measures taken to ensure its implementation, the progress made on achieving objectives, and whether (and how) the effectiveness of the policy is measured.
- 05** **SELECTION PROCESS** - Disclosure of the board's (or its committee's) consideration of the representation of women in the director identification and selection process, or an explanation of the absence of such consideration, including whether it considers the level of female representation on boards in identifying and nominating candidates and, if not, why not.
- 06** **APPOINTMENTS** - Disclosure of the consideration given to the representation of women in executive positions when making appointments, or an explanation of the absence of such consideration.
- 07** **VOLUNTARY TARGETS** - Disclosure of any targets voluntarily adopted by the issuer regarding female representation on the board or in executive positions and, if none, an explanation for their absence.

Approaches to Gender Diversity in Australia, the US and the UK

Looking outside of Canada, different jurisdictions have already adopted, or are considering adopting, different approaches designed to foster gender diversity among public companies, with some approaches being more aggressive than others. For example, some jurisdictions, such as Norway, Spain and France, have adopted mandatory quotas or targets in order to promote diversity on boards and accelerate improvements in the representation of women in leadership positions. More consistent with the approach proposed by Canadian regulators, other jurisdictions, such as Australia and the UK, have opted for a voluntary disclosure approach over strict rules or prescriptions that some argue can result in a “one size fits all” model that fails to account for the circumstances of each issuer and its board, and can result in the loss of qualified directors. We have briefly highlighted below the approaches taken in Australia, the US and the UK, to provide a comparison to the Canadian approach under the Proposed Amendments.

THE AUSTRALIAN APPROACH

Australia has been an early mover in promoting gender diversity in publicly listed companies. The approach proposed by the Canadian regulators is most similar to the Australian model. The Corporate Governance Council (the “CGC”) of the Australian Securities Exchange (the “ASX”) introduced diversity amendments to its Corporate Governance Principles and Recommendations (the “Principles and Recommendations”) effective January 1, 2011. The diversity amendments are applicable to ASX-listed issuers and impose an “if not, why not” model similar to the Canadian regulators’ “comply or explain” Proposed Amendments. The ASX Principles and Recommendations propose that issuers:

- Establish a nomination committee that considers succession plans and the achievement of diversity on the board;
- Annually disclose the mix of skills and diversity the board of directors is looking to achieve in board membership;
- Establish and disclose a diversity policy;
- Annually disclose the measurable objectives for achieving gender diversity set by the board and the progress towards meeting those objectives;
- Annually disclose the proportion of women in the whole organization, in senior executive positions and on the board; and
- Annually disclose any departure from the Principles and Recommendations.

The CGC was also considering a proposal to limit the tenure of independent directors to a maximum of nine years but recently backed away from the proposed cap following a public consultation period where some of the country's largest companies resisted the proposal.

THE US APPROACH

The US approach has remained unchanged for the past few years, and is limited to disclosure of how a corporate board or nominating committee considers diversity generally in identifying director nominees. In 2010, the US Securities and Exchange Commission (the "SEC") amended Regulation S-K to require the disclosure of additional factors that are considered by a board or nominating committee when identifying nominees for director, such as, but not limited to, board diversity. If the nominating committee has a policy with regard to the consideration of diversity in identifying director nominees, issuers must describe how this policy is implemented and how the nominating committee or the board assesses the effectiveness of its policy. Notably, the SEC does not define diversity, leaving it up to companies to conceptualize diversity in ways that they consider appropriate.

With several US governance advocates, leaders at public companies, and regulators closely monitoring developments in the Canadian, Australian and UK contexts, the SEC and other federal and state regulators may face increased pressure to take additional steps, including possible rule changes, to increase the representation of women among US public companies.

THE UK APPROACH

In September 2012, the Financial Reporting Council amended the UK Corporate Governance Code (the "UK Code"), which amendments include considerations relevant to gender diversity. The UK Code is not a rigid set of rules, but rather a guide to effective board practice that imposes a "comply or explain" regime on all companies with a premium listing of equity shares, whether incorporated in the UK or elsewhere. The UK Code sets out the principle that there should be a formal, rigorous and transparent procedure for the appointment of new directors to the board. The search for and appointment of board candidates should be conducted on merit and measured against objective criteria, with regard to the benefits of diversity on the board, including gender. The UK Code recommends that a separate section of the issuer's annual report describe the work of the nomination committee, the board's policy on diversity (including gender), any measurable objectives it has set for implementing the policy and progress on achieving the objectives. Disclosure should also be made with respect to the use of external search consultants or advertisements in the appointment of a chair or non-executive director.

The UK Code also sets out the principle that the board should annually evaluate its performance, including a consideration of the balance of skills, experience, independence, knowledge and diversity (including gender) of the board.

Next Steps and Considerations for Canadian Boards

Given the heightened focus on gender diversity and on board effectiveness more generally by regulators, investors, governance watchdogs and other stakeholders both in Canada and internationally, and given that progress in the area has been relatively slow, we expect the Proposed Amendments will be adopted in some form. As such, boards of Canadian issuers should:

- Carefully consider and evaluate what, if any, steps and policies they have adopted, or should adopt, in order to foster diversity on their boards and to maximize the effectiveness of their boards and corporate decision-making.
- Regularly evaluate the effectiveness of the board, its committees and individual directors, as well as the appropriateness of the director and executive screening and selection process, to ensure the right candidates with the appropriate mix of experience, skills and attributes comprise their leadership roles.
- Start positioning themselves to provide the annual disclosure contemplated by the Proposed Amendments. To assist issuers in this process, the next section provides examples of a range of disclosure options with respect to the Proposed Amendments that have been taken from the annual disclosures of issuers in the three other jurisdictions discussed above. The examples range across a spectrum of disclosure styles as we expect the level of detail and types of statements will vary depending on company size, practice, industry and other factors.
- Consult with their legal advisors and, if deemed advisable, other external advisors to craft the appropriate policies or processes that best meet the needs of the business, and to prepare accurate and transparent disclosure reflective of those policies and processes. As gender diversity and board effectiveness and decision-making is expected to be a continued area of focus, issuers should be careful not to blindly adopt processes used by others or boiler-plate disclosure.

While the past couple of years has shown increased attention on diversity within Canadian corporate leadership, debate continues regarding the best means of enhancing board diversity and effectiveness. In response to the Proposed Amendments, some commentators have urged regulators to go

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further and strengthen the proposed rules to make them less voluntary. Some commentators have also suggested that the Proposed Amendments should consider more than just gender, urging the regulators to expand the initiative to include reporting on diversity in areas such as race, ethnicity and aboriginal status. In the medium- to long-term, we expect there will be continued calls for further reforms to encourage diversity on boards and in management more broadly, including promoting racial and ethnic diversity among the leadership of Canada's public companies.

While it is too soon to determine the precise effect of the Proposed Amendments on Canadian public companies, it is clear that monitoring and evaluating the effectiveness of boards and individual directors will continue to be a major focus of Canadian and international regulators, investors, proxy advisory firms and other stakeholders. With these enhanced disclosure requirements anticipated to come into effect in the very near future, issuers now have the opportunity to proactively consider and, if necessary, improve their policies and disclosure practices with respect to diversity, and to stay abreast of these important developments.

Examples of Disclosure

Examples of Disclosure

This section provides examples of disclosure found in public documents in non-Canadian jurisdictions that generally correspond to items in the Proposed Amendments.

Items in grey are selected aspects of the Proposed Amendments. Examples of public company disclosure from other jurisdictions are found below the grey areas.

OSC PROPOSED AMENDMENT

Item 11 - Policies regarding the representation of women on the board

(a) Disclose whether the issuer has adopted a policy for the identification and nomination of women directors. If the issuer has not adopted such a policy, disclose why it has not.

(b) If an issuer has adopted a policy referred to in (a), disclose the following in respect of the policy:

- (i) a short summary of its objectives and key provisions,
- (ii) the measures taken to ensure that the policy has been implemented effectively,
- (iii) annual and cumulative progress by the issuer on achieving the objectives of the policy, and
- (iv) whether and, if so how, the board or its nominating committee measures the effectiveness of the policy.

EXAMPLES OF DISCLOSURE

Disclosure regarding objectives and key provisions of policy for the identification and nomination of women directors

- Assist in the development of a pipeline of high-calibre candidates by encouraging a broad range of senior individuals within the business to take on additional roles to gain valuable board experience:
 - A number of internal initiatives are underway to actively develop, nurture and strengthen a pipeline of talent through the business, including: a comprehensive talent review presented to the board annually; the introduction of our internal Leadership Development Service, which partners key talent across the business and assists them in focusing and broadening their skill sets and experience for future opportunities; and executive, coaching and mentor schemes.

Examples of Disclosure

- Consider candidates for appointment as non-executive directors from a wider pool, including those with little or no listed-company board experience.
- Ensure 'long lists' of potential non-executive directors include 50% female candidates.
- In 2011, the board outlined its aspirational goal of increasing the number of women on the board to at least three over the following two years. The board remains committed to this goal, and continues to work towards it in a structured manner, looking out over a five-year period at the skills, backgrounds, knowledge experience and diversity on the board. Independent search firms in the US, UK and Australia have been retained over the last few years to specifically consider potential female candidates. The candidate search actively considered both potential female candidates and other diversity considerations, including background, experience and culture.
- Increase female representation by one on each asset and operations leadership team by end of 2015 (where business leadership team comprises less than 50% females).
- Due to the size and structure of the company no measurable objectives have been set with respect to gender diversity.
- The company has no formal policy regarding "diversity" on the board. The governance committee seeks candidates without regard to race, color, gender or national origin.
- The company is not currently in compliance with these recommendations as the board is comfortable that the company already has an appropriate approach to encouraging workplace diversity without the need for a formal policy.

OSC PROPOSED AMENDMENT

Item 12 - Consideration of the representation of women in the director identification and selection process

Disclose whether and, if so how, the board or nominating committee considers the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board. If the issuer does not consider the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board, disclose the issuer's reasons for not doing so.

EXAMPLES OF DISCLOSURE

- The board has adopted a process for the appointment and selection of directors which provides that when a new director is to be appointed, the board, together with the remuneration committee, will review the range of skills, experience and expertise on the board, identify its needs and prepare a short list of candidates with appropriate skills and experience. Where necessary, advice will be sought from experienced and independent search consultants. When engaging the services of search consultants, the company instructs them to have broad selection criteria that include a mix of skills, experience, and attributes from all areas of business. In addition to the particular criteria identified by the board as desired of a new appointment, search consultants are expected to seek candidates who have experience in a listed-company environment which would enable them to make positive contributions to the board. Search consultants are required to ensure that both male and female candidates are equally considered, and are instructed to identify candidates who are team players, capable of challenging management in a constructive way, and adding value to the business.
- The board is responsible for identifying qualified individuals for appointment to the board. In identifying candidates, the board will have regard to the selection criteria set out in the board appointment process, which will include: (a) skills, expertise and background that add to and complement the range of skills, expertise and background of the existing directors; (b) diversity; and (c) the extent to which the candidate would fill a present need on the board.
- In addition, the board's director recruitment efforts over the time since the corporation became a public company have involved consideration of

Examples of Disclosure

gender and regional diversity, and such factors have been given increasingly greater weight. The nominating committee assessed the effectiveness of its emphasis on diversity by its ability to recruit and appoint women as directors, and also to achieve regional diversity with its newest members. Women directors account for 22% of our board's representation currently. Diversity is one of the factors, among many others, that the nominating committee considers in identifying and assessing director candidates.

- The corporate governance and nominations committee will require a thorough outreach and search process to ensure that at least 25% of all candidates for new positions or vacancies on the board will be women to ensure a better representation of women in the pool of candidates.
- Presently, the board does not have a female member; however, it is the policy of the board that diversity be considered in the selection and nomination of any replacement director, or should an additional appointment be required.
- The candidate search actively considers both potential female candidates and other diversity considerations, including background, experience and culture.
- While the board does strive for diversity and takes into account factors such as gender, ethnic background, geographic origin and other personal characteristics when considering new directors, the board considers knowledge, skills, experience and character of an individual to be the most important criteria in determining the value he or she may bring to the board. The corporate governance committee uses a skills matrix to help identify gaps in the skills and competencies currently considered most relevant for the company.
- Our director selection guidelines do not narrowly define diversity by reference to gender and race; rather diversity is broadly interpreted to include other factors such as age, geographic and professional diversity.

OSC PROPOSED AMENDMENT

Item 13 - Consideration given to the representation of women in executive officer appointments

Disclose whether and, if so how, the issuer considers the level of representation of women in executive officer positions when making executive officer appointments. If the issuer does not consider the level of representation of women in executive officer positions when making executive officer appointments, disclose the issuer's reasons for not doing so.

EXAMPLES OF DISCLOSURE

- Gender equality at all levels of the organization is an important component of the group's diversity strategy. The group will continue to grow the number of women performing senior management roles utilizing all relevant aspects of this diversity policy, including merit based selection.
- During each director and executive selection and appointment process, the board will reinforce the company's recruitment and selection processes and ensure the professional search firm presents a diverse pool of candidates.
- As the company does not have any employees other than non-executive directors, it does not have a gender diversity policy for other levels of management or employees.

OSC PROPOSED AMENDMENT

Item 14 - Issuer's targets regarding the representation of women on the board and in executive officer positions

- (a) For purposes of this item, a "target means a number or percentage, or a range of numbers and percentages, adopted by the issuer of women on the issuer's board or in executive officer positions of the issuer by a specific date.
- (b) Disclose whether the issuer has adopted target(s) regarding women on the issuer's board. If the issuer has not adopted such target(s), disclose why it has not.
- (c) Disclose whether the issuer has adopted target(s) regarding women in executive officer positions of the issuer. If the issuer has not adopted such target(s), disclose why it has not.
- (d) If the issuer has adopted target(s) referred to in either Item 14(b) or (c), disclose the annual and cumulative progress of the issuer in achieving its target(s).

EXAMPLES OF DISCLOSURE

- In 2012, we adopted a board diversity guideline that sets the objective that at least 25% of board members should be women. We currently exceed this guideline: five of the 17 directors (over 29%) are women.
- The corporate governance and nominating committee recommended enhancements to the board diversity policy and recommended a guideline that sets the objective that at least 33% of directors be women. Currently, five of 16 nominees for the board of directors are women (31%).
- The board aspires towards a board composition in which each gender comprises at least one-third of the independent directors.
- Since 2010, the company has been aiming for at least 33.33% female representation on the board and in management (defined as the first three levels of management after the managing director and CEO) by 2015.
- Maintain a level of at least 30% female directors on the board over the short to medium term.
- The company targets at least 20% female representation on the board, although this has not been fulfilled as the company was not able to secure suitable female candidates when vacancies have arisen.

- The board is committed to workplace diversity, in particular gender diversity, and has adopted a diversity policy that includes but is not limited to, gender, age, ethnicity and cultural background. Owing to the small number of board members and employees, and low staff turnover, the company does not set specific representation targets but does take diversity into account when hiring and promotion opportunities arise.

OSC PROPOSED AMENDMENT

Item 15 - Number of women on the board and in executive officer positions

- (a) Disclose the number and proportion of women (in percentage terms) of directors on the issuer's board who are women.
- (b) Disclose the number and proportion (in percentage terms) of executive officers of the issuer, including all subsidiary entities of the issuer, who are women.

EXAMPLES OF DISCLOSURE

- With 38% of its directors being women, the bank is a leader in gender diversity in its field. The committee strives to continue to increase the board's representativeness and diversity.
- As at 30 June 2013, the proportion of women at various levels of the company was: director, 0%; senior executives, 0%; people managers, 43%; company, 53%. The company recognizes that a continuing key challenge for the group will be increasing female representation at the board and senior executive level.
- Reflecting the global nature of our business, our directors are citizens of the United States, Germany, India, Mexico and the United Kingdom. We have three female directors, one African-American director, one Indian director and one Hispanic director out of a total of 11 directors, as of the date of this proxy statement. Our directors come from diverse backgrounds, including in the business, non-profit and governmental arenas.
- Board of directors by gender: female, 12.5%; male, 87.5%

Examples of Disclosure

- The company does not currently have any women on the board (and has no senior executives other than executive directors). 50% of the company's current employees are female.
- The diversity position within the group at 30 June 2013 on a full-time equivalent basis within the Group is:

Gender representation	Female (%)	Male (%)
Board representation	0%	100%
Executive team representation	50%	50%
Senior management representation	26%	74%
Group representation	51%	49%

Key Contacts

If you are interested in receiving more information, please contact us or visit our website at dwpv.com.

The information in this guide should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.



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